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No. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v.

GEORGE SUMMERS
Respondent

ON WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

DO DUNAWAY v NEW YORK AND YBARRA v ILLINOIS COMPEL THE CONCLUSION, AS THE MICHIGAN SUPREME COURT HELD THEY DO, THAT THE "STANDARD FOR DETERMINING WHETHER A SEIZURE-DETENTION IS LEGAL IS NOT WHETHER THE POLICE OFFICER'S ACTIONS WERE REASONABLE UNDER THE CIRCUMSTANCES BUT RATHER WHETHER THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST"?

II.

DOES A SEARCH WARRANT FOR PRIVATE PREMISES AUTHORIZE A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON?

III.

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, CAN IT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD BE APPLIED?

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976). The opinion of the Michigan Supreme Court is reported at 407 Mich 432; 286 NW 2d 226 (1979). Rehearing was denied on February 29, 1980.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (rehearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 10, 1974, a team of Detroit Police Officers was dispatched to execute a warrant to search premises located at 9356 Mansfield in Detroit (J.A. 6). The warrant was issued to search the entire premises and seize Heroin and any other narcotics and narcotics paraphernalia (J.A. 60). The warrant recited that an informant had previously purchased Heroin at the Mansfield address from a black male known as "George" (J.A. 60-61).

Upon arriving at the premises named in the warrant, police officers Lehman and Conant observed respondent leave the premises to be searched through the front door and proceed down the front porch steps (J.A. 6, 25). Officer Lehman approached respondent, identified himself as a police officer, and asked respondent if he lived in the house he had just exited (J.A. 6). Upon respondent's affirmative response, Officer Lehman showed him the search warrant and asked if he could open the door (J.A. 6). Respondent replied that he could not because he had left his keys inside, but he could ring someone over the intercom (J.A. 6).

One Dwight Calhoun opened the inner door upon respondent's request, but when Officer Lehman identified himself as a police officer and attempted to open the storm door (which was locked) Calhoun slammed the inner door shut in his face (J.A. 7-8). The door was then forced, and Officer Lehman instructed Officer Conant to bring respondent into the living room, where he and seven other persons in the house were detained while the search was conducted (J.A. 16, 27-29).

A search of the premises revealed two plastic bags of suspected Heroin under the bar in the basement (J.A. 24). It having been determined that respondent was the owner of the premises, he was formally arrested on the narcotics charge. A custodial search of

his person followed, revealing a plastic bag of Heroin in his jacket pocket (J.A. 24). It was for possession of this Heroin that respondent was ultimately charged.

Following a preliminary examination, respondent was bound over for trial. The trial judge granted a motion to suppress the evidence and quashed the information. The Michigan Court of Appeals affirmed the trial court, 68 Mich App 571; 243 NW 2d 689 (1976), and on December 27, 1979, the Michigan Supreme Court also affirmed, holding that the detention of respondent while the search was conducted was without probable cause, and, therefore, based on Dunaway v New York and Ybarra v Illinois, unconstitutional. The Heroin found in his jacket was thus properly suppressed, being the fruit of an illegal arrest. Three justices dissented, finding that the majority had employed the wrong standard in reviewing the officers' conduct and concluding that the temporary detention was reasonable and therefore constitutional. The dissenting justices found Dunaway and Ybarra to be distinguishable.

SUMMARY OF ARGUMENT

In this cause the Michigan Supreme Court held that the "general standard for determining whether a seizure-detention is legal is not whether the police officers actions were reasonable under the circumstances, but rather whether the police officer had probable cause to arrest" (emphasis in original). 407 Mich at 446; 286 NW 2d at 228. The court thus found the detention of respondent while his dwelling was searched pursuant to warrant to be unconstitutional under Dunaway v New York, 442 US 200 (1979).

It is petitioner's position that seizures of the person are governed by the reasonableness clause of the Fourth Amendment, and that the Michigan Supreme Court erred in holding otherwise. Reasonableness entails a balancing of the individual's Fourth Amendment interest against arbitrary intrusions and the public interest involved in the particular seizure. Such balancing can and should be done on a generic or categorical basis to give guidance to both police officers and judges. The detention of persons on (or departing from) premises to be searched pursuant to warrant while the warrant is executed should be recognized as reasonable. The detention of respondent was reasonable, and the discovery of the Heroin on his person proper as fruit of a search incident to arrest once Heroin was discovered in his basement.

Petitioner also contends that there is an independent justification for the search of respondent; that is, his person was included within the warrant. A search warrant for private premises should allow a search of reasonable scope and intensity of persons on the premises where the items named in the warrant might reasonably be expected to be concealed on the person. Ybarra v Illinois, ___ US ___; 62 L Ed 2d 238 (1980) does not compel a different result. The present case is distinguishable in that it involves a private dwelling rather than a place of public accommodation. While it may not be reasonable to believe patrons of a bar

would have an interest in the items named in the warrant or in frustrating the warrant, such a belief regarding those present in a private dwelling is reasonable. Further, respondent here had a relationship to the premises (owner) which Ybarra did not, rendering his search all the more reasonable.

Even if this Court finds the officers' conduct to have been unconstitutional, it was nevertheless undertaken in a good faith reasonable belief that it was proper. It certainly cannot be said that the officers knew or should have known that their conduct was violative of the Fourth Amendment. See United States v Peltier, 422 US 531 (1975). To exclude the truth in these circumstances would serve no useful purpose and would inflict gratuitous harm on the public interest.

ARGUMENT

I.

THE DETENTION OF RESPONDENT WHILE THE PREMISES WERE SEARCHED PURSUANT TO WARRANT WAS REASONABLE AND THEREFORE CONSTITUTIONAL.

A. A Detention Far Less Intrusive Than An Arrest To Answer For A Crime Does Not Require A Showing Of Probable Cause, But Is Constitutional If Found Reasonable When The Competing Interests Of the Individual And Society Are Balanced.

The Fourth Amendment assures that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Amendment contains two separate and independent clauses, joined by the conjunction "and," each "prohibiting a category of governmental conduct." Marshall v Barlows, Inc., 436 US 307 (1978), Justice Stevens dissenting; Ybarra v Illinois, ___ US ___; 62 L Ed 2d 238, 251 (1980), Justice Rehnquist dissenting; Go-Bart Co. v United States, 282 US 344, 356-357 (1931); Payton v New York, ___ US ___; 63 L Ed 2d 639, 649 (1980). In the case of searches, the warrant clause and the reasonableness clause are ordinarily wedded; that is, with certain specifically established and well-delineated exceptions, warrantless searches are

per se unreasonable. Katz v United States, 389 US 347, 357 (1967). Moreover, within the warrant clause, the warrant requirement is linked "textually . . . to the probable-cause concept." South Dakota v Opperman, 428 US 364, 370, n.5 (1976); but see Marshall v Barlows, supra, Camara v Municipal Court, 387 US 523 (1967); See v City of Seattle, 387 US 541 (1967). Seizures of the person, however, have not been viewed as falling inevitably within the warrant clause; indeed, a warrant requirement for an arrest is the exception rather than the rule.[1] See United States v Watson, 423 US 411 (1976); United States v Santana, 427 US 38 (1976); Payton v New York, supra. Petitioner submits, then, that seizures of the person must be judged under the reasonableness clause, and while arrests to answer for a crime, or detentions not materially less intrusive than an arrest to answer for a crime, must be viewed as unreasonable unless supported by probable cause in the traditional sense, Dunaway v New York, 442 US 200 (1979), less intrusive classes of detentions may be deemed reasonable even if unsupported by probable cause to hold the person to answer for a crime. Terry v Ohio, 392 US 1 (1968). The Michigan Supreme Court erred in holding that:

> . . . the general standard for determining whether a seizure-detention is legal is not whether the police officers actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest (emphasis by the court). People v Summers, 407 Mich 432, 446; 286 NW 2d 226, 228 (1979).

The detention of persons on (or in the process of departing from) premises to be searched under warrant while the warrant is executed is reasonable and therefore constitutional.

This Court has stated time and again that "The touchstone of our analysis under the Fourth Amendment

is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " Pennsylvania v Mimms, 434 US 106 (1977); quoting Terry v Ohio, supra at 19. See also Delaware v Prouse, 440 US 648 (1979); United States v Brignoni-Ponce, 422 US 873 (1975). Dunaway v New York, supra, relied on almost exclusively by the Michigan Supreme Court for its decision, did not overrule this authority, either explicitly or impliedly, holding only that "detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 US at 216. This holding is not inconsistent with petitioner's position, for the detention here was much less severe an intrusion than that in Dunaway.

Of course, the watershed case recognizing that detentions which involve an intrusion on individual security less severe than an arrest to answer for a crime may be accomplished absent information arising to the level of probable cause to arrest is Terry v Ohio, supra. In allowing an officer to make an investigative stop on reasonable suspicion that criminal activity is afoot, and a frisk on reasonable suspicion that the individual stopped is dangerous, this Court rejected petitioner Terry's argument that the law of arrest, requiring probable cause, had already worked out the balance between the government's interest in the intrusion and the individual's interest in personal security. The argument was rejected because the governmental interests involved in an arrest and a stop are not identical, nor is the individual's interest in his personal security identical, as one intrusion is much more severe. An arrest is "a wholly different kind of intrusion upon individual freedom" than a stop or a temporary detention in the place where a search warrant is being executed. It is ". . . the initial stage of a criminal prosecution . . . . , is intended to vindicate

society's interest in having its laws obeyed, and . . . is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." 392 US at 26. This Court held that its "evaluation of the proper balance that has to be struck in this type of case" led to the conclusion that the sort of conduct engaged in by Officer McFadden was proper when "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 US at 20, 27.

In United States v Brignoni-Ponce, supra, this Court again gauged the propriety of a particular class of seizures under the Fourth Amendment by assessing their reasonableness, with reasonableness being determined by striking "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 US at 878. At issue was the authority of United States Border Patrol officers to stop automobiles for the sole purpose of questioning the occupants regarding their citizenship and immigration status. This Court weighed the valid public interest in preventing illegal entry against the "modest" intrusion involved in the momentary stop of an auto to question the occupants, and held that such stops are permissible under the Fourth Amendment where based on a reasonable suspicion that the vehicle may contain aliens who are illegally in this country. 422 US at 881. Similarly, in United States v Martinez-Fuerte, 428 US 543 (1976) this Court "weighed the public interest against the Fourth Amendment interest of the individual," 428 US at 554, in holding that routine automobile stops at a border checkpoint are constitutional under the Fourth Amendment even "in the absence of any individualized suspicion. . . ." 428 US at 562.

A different sort of seizure was tested for reasonableness in Pennsylvania v Mimms, supra. The question presented was whether it is "reasonable and

thus permissible under the Fourth Amendment" for a driver of an automobile lawfully stopped for a traffic violation to be ordered out of the auto. Balancing the state's interest, the safety of the officer, against what is at most a "mere inconvenience" to the individual, this Court approved the practice.

The police conduct in question in Delaware v Prouse, supra, was random automobile stops for the purpose of checking automobile registrations and driver's licenses. Observing that "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by . . . law enforcement agents . . . . ," 440 US at 653, and that whether a particular police practice is reasonable and hence constitutional is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests," 440 US at 654, the Court found the governmental interest insufficient to justify allowing the wholly discretionary intrusion, though reserving whether similar stops would be justified if not left to the unbridled discretion of the individual officer (e.g. roadblocks, and fixed checkpoint stops for registration and license checks).

The teaching of these cases is consistent and clear. Classes of detentions are viewed as constitutional if reasonable. Reasonableness is determined by balancing the governmental interest served by the detention against the individual's interest in personal liberty. The more severe the intrusion, the more information and the greater the governmental interest required to justify it. Arrests, the most severe intrusion, require the greatest degree of information -- probable cause. Stops, a lesser intrusion, are justified by the state's interest in effective crime prevention and detection, and require a showing of reasonable suspicion. Fixed checkpoint stops at borders are justified by the interest in preventing illegal entry into

the country, and, because the intrusion is very slight, require no showing of individualized suspicion. What, then, of Dunaway v New York, relied upon so heavily by the Michigan Supreme Court? Did it abolish the balancing test for reasonableness?

It must be remembered that the precise question in Dunaway was "the legality of custodial questioning on less than probable cause for a full-fledged arrest," 442 US at 202, and the precise holding that "The Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation." 442 US at 216. Further, probable cause was found necessary to support the intrusion in Dunaway because of the severity of the intrusion: "the detention of petitioner was in important respects indistinguishable from a traditional arrest" (emphasis added). 442 US at 212. Although there is dicta in Dunaway which "might be read to indicate that Terry v Ohio . . . is an almost unique exception to a hard-and-fast standard of probable cause," 442 US at 219, Justice White concurring, the facts, issue, and holding of the case do not compel the conclusion that probable cause to support an arrest is necessary to justify the detention even in the instance of a substantially less severe intrusion and a different governmental interest than involved in detention for custodial interrogation. The teaching of Terry, Mimms, Brignoni-Ponce, Martinez-Fuerte and other cases is precisely to the contrary.

Although theory perhaps supports the proposition that probable cause is a sliding scale which in each and every case must be measured against the degree of the intrusion and the significance of the governmental interest in achieving it, petitioner does not argue for such a position. Indeed, petitioner agrees that such a balancing test is "too subtle and sophisticated a device to be workable in day-to-day practice," and that "it is

clearly asking too much to expect policemen to make on-the-spot judgments in this way or, indeed, to require trial judges to review police conduct in this fashion." 3 LaFave, Search and Seizure, p. 14. Rather, petitioner submits that the balancing test is appropriate "as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action" (emphasis added). LaFave, supra. As cogently put by Justice White concurring in Dunaway, in the main balancing must be done on a categorical basis in order to provide the police and courts with workable rules. But the balancing test allows for the "generic recognition" of classes of detentions which are reasonable on lesser information than probable cause "where more flexibility is essential." 442 US at 220.

The balancing test as a method of assessing reasonableness is essential precisely because detentions take on a myriad of forms, some of which are reasonable though not falling within the confines of either arrest or stop. The existence of a test allowing flexibility is necessary to validate these detentions where appropriate, and allow the continued development of the law and reasonable police practices. For example, though yet to rule on the question, in Davis v Mississippi, 394 US 721 (1969) this Court suggested the possibility that a certain class of detentions at the police station might be permissible on information not arising to probable cause to arrest — detentions for fingerprinting, where the reliability of the practice as a crime solving tool is high, and the intrusion much less serious than arrests to answer for a crime (or "arrests" for interrogation). Based on this language a number of statutes have been enacted providing for a narrowly drawn authority for detentions for the purpose of obtaining evidence of identifying physical characteristics on less than probable cause to arrest.[2] Such statutes and detentions have been consistently upheld by reviewing courts.[3] Dunaway should not be read as disallowing the "generic

recognition" of this class of reasonable detentions.[4] See LaFave, supra, 1980 Supp, p. 14-17.

Petitioner submits that the present case is appropriate for generic recognition of a category of reasonable detentions on less than probable cause to arrest; that is, detentions of persons on (or departing from) premises to be searched pursuant to warrant until the search is completed. Case law in the area is scant, as most cases deal with the question of the permissibility of frisks of persons on premises to be searched pursuant to warrant, and uphold such frisks, thereby deciding sub silencio the propriety of the detention.[5] Although the validity of these cases on the frisk question is subject to some doubt given this Court's holding in Ybarra v Illinois, supra, Ybarra does not stand for the proposition that those on premises to be searched pursuant to warrant may not be detained until the search is completed. One federal circuit has held such a claim to be "clearly frivolous." United States v Michell, 487 F 2d 429, 430 (CA 1, 1973). See also State v Valdez, 577 P 2d 564, 567 (NM Ct App, 1978); City of Olympia v Culp, 240 P 360, 361 (1925); State v Ryan, 1 P 2d 893 (Wash, 1931).

The governmental interest in allowing such detentions is valid and weighty; the safety of the officers and avoidance of the frustration of the warrant. Particularly where the object of the warrant is easily secreted or destroyed there is strong justification for not allowing those present on the premises to roam about at will. The warrant itself also represents a valid governmental interest in obtaining evidence of crime where a judicial officer has commanded the intrustion into the premises and the search on the basis of probable cause. Moreover, as stated by the dissenting justices in the Michigan Supreme Court, "we recognize the fact that armed violence not infrequently accompanies the use of or traffic in narcotics — a fact well-known to the police.

Cf People v Nefzger, 173 Colo 199, 200-201; 476 P 2d 995, 996 (1970)." People v Summers, 407 Mich at 460; 286 NW 2d at 235 (1979). Whatever the object of the search, the government's interest in controlling the situation while the warrant is executed outweighs the inconvenience caused the persons temporarily detained, who are only compelled to stay further in a place they have chosen to frequent (in this case, respondent was compelled only to remain only in his own home). Given this modest intrusion, a valid governmental interest, and a prior judicial determination that there is probable cause to believe that items in some way connected to criminal activity are on the premises, the detention should be viewed as "reasonable and thus permissible under the Fourth Amendment." Mims, supra.

B. The Case At Bar.

The instant case falls within petitioner's proposed generic class. Respondent was seen to depart the premises to be searched as the officers approached. Before he was detained it was known that he had keys to and indeed lived in the premises from which Heroin had been sold, and that he knew the officers were going to search the premises (he was shown the warrant). The person answering the door had slammed it shut upon learning the officers' authority and purpose. The governmental interests in respondent's detention outlined above obtain, and the intrusion involved in causing him to cross his own threshold and remain in his own house while the search was conducted was minimal. As the dissenting justices in the Michigan Supreme Court observed, the police were confronted with a situation where an "inhabitant of a house where trafficking in drugs was allegedly conducted might escape to summon aid or himself interfere with the execution of the warrant." 407 Mich at 459; 286 NW 2d at 235. Though a search and/or detention cannot be justified by its fruits, in assessing the legitimacy of the concern of officers for their safety when executing

search warrants it should be noted that discovered in the search was one 30.06 Winchester with Bushnell scope, one BSA pellet gun with scope, and one Erfurt Luger, and that there were eight people on the premises. The detention of respondent was reasonable and thus constitutional.

Once it is recognized that the detention of respondent was proper then it plainly follows that he was arrested upon probable cause after the discovery of the Heroin in his basement. Though the Michigan Supreme Court majority did not reach the probable cause question, viewing respondent's arrest and the seizure of the Heroin in his pocket as fruit of an illegal detention, it is clear, as the dissenting justices would have held, that the Michigan Court of Appeals majority assessed probable cause under the wrong standard.

The Michigan Court of Appeals majority found respondent's arrest after the discovery of the Heroin in his basement to have been without probable cause because, based on Michigan law,[6] respondent could not have been convicted of possession of the Heroin found in the basement. The court stated that in order to find probable cause to arrest there "must be some evidence of the type or quality necessary to support a conviction." This is clearly incorrect. In reviewing the probable cause question this Court said in Wong Sun v United States, 371 US 471 (1973) that:

> It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which would 'warrant a man of reasonable caution in the belief' that a felony has been committed . . . , must be measured by the facts of the particular case (emphasis added).

See also Michigan v DeFillippo, ___ US ___; 61 L Ed 2d 343 (1979).

Analyzing the instant case not under a sufficiency of the evidence to convict standard, but asking whether the officers possessed such information as would lead a reasonably discreet and prudent man to believe that a felony has been or was being committed, keeping in mind "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," Draper v United States, 358 US 307 (1959), petitioner submits that the answer must be that probable cause did exist. A reasonably discreet and prudent man, faced with circumstances apparent to the officers in this case, would believe that respondent controlled the Heroin found in his basement. There being, then, probable cause to arrest, the Heroin found in respondent's jacket pocket was the product of a search incident to arrest. United States v Robinson, 414 US 218 (1973); Gustafson v Florida, 414 US 260 (1973). This Court should find that probable cause existed, or, if the Court finds the detention lawful, remand to the Michigan Supreme Court to determine the probable cause issue.

Argument

II.

A SEARCH WARRANT FOR PRIVATE PREMISES PERMITS A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON.

Respondent in this case was observed by police officers leaving premises to be searched pursuant to warrant. He was shown the warrant and indicated that he had keys to the dwelling but that they were inside. The person who eventually answered the door slammed it shut upon the officers' announcement of their purpose and authority. After the door was forced, respondent was brought into the house. It was this detention, bringing respondent into his home and requiring him to remain while the warrant was executed, which the Michigan Supreme Court found violative of the Fourth Amendment, not because it was unreasonable, but because it was unsupported by probable cause (see Issue I, supra).

Respondent was arrested after Heroin was found in his basement, and the Heroin which was found in his jacket (and which formed the basis of the charge against him) was found in a search incident to that arrest. Petitioner submits that there is an independent justification for the seizure of the Heroin from respondent; that is, it was properly seized pursuant to the execution of the search warrant. It is of no moment that the officers did not search respondent on this basis, for this Court has held that ". . . the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal

justification for (his) action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott v United States, 436 US 128, 138 (1978).

A. Respondent Was On The Premises.

The Michigan Supreme Court, though granting leave on the issue, did not resolve the question of whether a premises directed search warrant allows a search of reasonable scope and intensity of persons on the premises where the items named in the warrant might reasonably be expected to be concealed on the person. In this the court erred, as even if it is true that respondent's detention cannot be justified as incident to the execution of the warrant (but see Issue I, supra), the detention is certainly justifiable if his person is viewed as within the scope of the warrant.

With regard to this question the Michigan Court of Appeals stated:

> Our courts have never explored the extent to which persons found upon the premises as a search warrant is executed can be searched without another warrant. This is not the occasion to decide that issue, for all the cited cases require at the very least presence upon the premises searched. That factor cannot be found here. The defendant was stopped outside of the house. There hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises. Taking defendant back inside did not change the situation. Even if the police acted legally in doing so, an issue we do not decide here, failure to search defendant's person certainly would not 'frustrate' the execution of the warrant. There could be little fear that items in the house would be taken and concealed by

> defendant, who was being detained and watched by Officer Conant. People v Summers, 68 Mich App 571, 579-580; 243 NW 2d 689, 692-693 (1976).

Petitioner disagrees that the factor of "presence" is not to be found in the instant case. When a container (in this case a person with pockets) is seen to leave the premises by officers who are on the scene to execute a search warrant, and that container is easily able to contain within it the items named in the search warrant, the search warrant also authorizes a search of the container. It simply makes no sense to say that containers which would be within the scope of the warrant fall without it if they depart the premises under the very eyes of the executing officers.

The logic of the position that containers which are seen by officers to leave the premises described in the search warrant, and which are likely repositories of the items to be seized, may be searched and seized pursuant to the warrant, is seen in State v Dearinger, 439 P 2d 971 (Wash, 1968), followed in State v Smith, 552 P 2d 1059 (Wash App, 1976). In Dearinger, officers arriving at a house to execute a search warrant for the premises heard something fall to the ground and discovered a man's sock in the neighboring yard. In the sock were bottles containing narcotics. The claim was made that the seizure and search of the sock was beyond the scope of the warrant as the sock was not on the premises described in the warrant. The court held:

> Where, during the lawful search of a building, the physical senses of the officers lawfully on the premises apprise them that occupants of the searched premises have, during or immediately preceding the search, thrown or removed something from the particular premises, if an article is found and taken during the search in such a place and under such circumstances as to leave a reasonable inference that it had been

thrown or placed there during or immediately prior to the search, it constitutes a seizure on or within the premises designated in the warrant (emphasis added). 439 P 2d at 973.

Similarly, in State v Smith, supra, officers executing a search warrant of premises for narcotics heard the toilet flush. A search of the septic tank revealed 15.6 grams of packaged Heroin. The search of the septic tank and seizure of the Heroin was challenged on the ground that the search exceeded the scope of the warrant, which was for premises. Quoting Dearinger, the court found the search to be within the scope of the warrant.

In the instant case, respondent was seen to leave the house by the officers who had arrived to execute the warrant. His person (pockets, etc.) was a place, or contained places, where the items named in the warrant — narcotics — might easily be concealed. The logical consequence of the statement by the majority in the Michigan Court of Appeals that "there hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises" is that a person within the premises may frustrate the execution of a search warrant by hurling a container holding the items named in the search warrant out of the building, even under the eyes of the searching officer. The container could not be searched, because any items in it would be outside the premises. When a ruling of law leads to absurd results, the premises of that ruling are suspect. Respondent was seen by the officers to leave the premises named in the search warrant. The subsequent search of his person must be viewed as within the scope of the warrant, if a search of the person pursuant to a warrant for premises is permissible. The Michigan Court of Appeals erred in viewing respondent's observed departure from the named premises as mooting the issue of the "extent to which persons found upon the

premises as a search warrant is executed can be searched without another warrant."

B. The Relationship Of The Person To The Premises Test.

The Michigan Court of Appeals majority rejected petitioner's argument that since the clothing of respondent was a place where Heroin could be located, the search warrant for premises included within it a search of reasonable scope and intensity of his person, as a person present on the premises, saying:

> The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259(1) only authorizes a magistrate to issue warrants to search certain places. Once a warrant has actually been issued, it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow the description. . . It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so. The 'particularity' requirement prevented the police from legally extending the scope of the warrant so as to authorize a search of defendant's person. 68 Mich App at 579; 243 NW 2d at 692.

Petitioner submits that this analysis begs the question, for the precise issue is whether a search of a person pursuant to a search warrant for premises is an extension of the scope of the warrant. Petitioner contends that just as it is clear that a search warrant for premises need not specify and describe every container, every piece of furniture, within the premises in which the items to be seized might be secreted, neither must it necessarily specify and describe

persons. A search of desk drawers and closets for narcotics would without doubt be considered to be a search of the premises of reasonable scope and intensity; so should a search of persons whose clothing contains places where narcotics might be concealed.

Ybarra v Illinois, supra, should not be read as controlling the instant case. The search warrant involved in Ybarra authorized the search of the "Aurora Tap Tavern. . . . Also the person of 'Greg' the bartender. . . ." for "Heroin, contraband, other controlled substances, money, instrumentalities and narcotics paraphernalia used in the manufacture, processing and distribution of controlled substances." This Court stated that the search of Ybarra's person could not be justified by the warrant, holding that the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 62 L Ed 2d at 246. Ybarra is distinguishable from the case at bar in several important respects: 1) Ybarra involved a place of public accommodation, this case a private residence; 2) Ybarra was not known to have any relationship to the searched premises other than his presence, respondent was known to have keys to the dwelling and to live there; 3) in Ybarra Heroin packets were observed only behind the bar and on the person of the bartender; here, someone in the house had sold Heroin to an informant. Petitioner first contends that respondent's relationship to the premises is a sufficient (though not necessary) condition to remove this case from the holding of Ybarra.

Few cases have dealt significantly with the question here at issue. Instructive are those cases dealing with the search of personal property of a person present on the premises to be searched.

The Court in United States v Johnson, 475 F 2d 977 (CS DC, 1973) held that the search of the purse of a

visitor pursuant to a search warrant for premises was proper where the purse was not being held by the person. Thus, the court said, the search was not that of the person, and, notwithstanding defendant's status as a visitor, the purse could be searched as it could have concealed the items named in the warrant. 475 F 2d at 979. Chief Judge Bazelon, concurring and dissenting, agreed that the suppression order could not stand, but for different reasons. He disagreed that the search of the purse could be justified under the warrant, because the officers knew defendant to be a visitor on the premises. However, Judge Bazelon noted in passing that the warrant would authorize the search of a person named in the warrant as the occupant of the premises (though apparently not named as a place to be searched):

> The warrant . . . authorized the search of an apartment that was . . . occupied by John Doe alias Pete described as a negro male, 49-50 years, 165 lbs., 5' 6", medium complexion. I do not doubt that this authorized the search of 'Pete' as well as his apartment. But the warrant did not authorize a search of an individual the police knew to be a mere visitor in the apartment (emphasis added). 475 F 2d at 980.

Thus, it appears that Judge Bazelon would allow the search of a person on the premises pursuant to a search warrant for premises where the items sought could be concealed on the person and the officers executing the warrant do not have knowledge that the person has no nexus with the premises. At the very least it is fair to say that Judge Bazelon would permit searches of persons named in the warrant as having some nexus with the premises.

The holding was similar in United States v Micheli, 487 F 2d 429 (CA1, 1973). The case involved a search warrant for certain business premises, and the search of defendant's brief case which was within the

premises. The items sought were counterfeit notes. The court carefully analyzed the problem, saying that a focus on actual physical possession was at once too broad and too narrow — the approach of "immunizing from a search under sanction of a premises warrant any item within the physical possession of an individual on the premises," United States v Teller, 397 F 2d 494 (CA 7, 1968), cert den, 393 US 937 (1968), is too broad in that "a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police;" it is too narrow in that many personal effects which may be set down should not be subject to search. The court turned to an examination of the relationship between the person and the place:

> . . . we base our decision on the fact that, as co-owner of the Hillside press (the premises), appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his brief case, which might be lying about the office. The search of his brief case, under these circumstances, was properly carried out within the scope of the warrant. 487 F 2d at 432.

The search of the person of respondent falls squarely within this rationale. Respondent was not a "mere visitor or passerby" who suddenly found his person vulnerable to a search of the premises; rather, he had a "special relation to the place," meaning that it could reasonably be expected that he might have items named in the search warrant on his person, or might

place them on his person to avoid their discovery during the execution of the warrant. The police in Ybarra had no reason to believe that Ybarra would have the items named in the warrant on his person precisely because the place was a place of public accommodation to which Ybarra had no special relationship. Respondent was not searched because "coincidentally" there existed probable cause to search the premises where he "happened to be," Ybarra, at 245, but because there was probable cause to search the premises where he was and to which he had a special relationship for items which could easily be concealed on the person. Ybarra should be read to stand for no more than the proposition that a search of persons on the premises of a place of public accommodation is beyond the scope of a warrant for the premises simply because it is not reasonable to suppose that the items named in the warrant will be on the persons of patrons, or that patrons have an interest in frustrating the warrant. Such a search is reasonable in scope where the person searched has a special relationship to the premises; indeed, had the warrant in Ybarra not specified the bartender as a place to be searched, can it be doubted that his search would nonetheless have been proper under the warrant for premises given the facts recited in the affidavit, including his relationship to the place? See Johnson, supra, at 980. Respondent's relationship to the place here removes this case from the holding and rationale of Ybarra.

C. Private Premises Versus Public Premises.

Petitioner submits that respondent's relationship to the premises searched is a sufficient, but not necessary, ground for distinguishing the instant case from Ybarra and allowing the search of respondent. The relationship is not necessary, for petitioner urges this Court to ground its decision on a different distinguishing aspect between Ybarra and the present case; namely, the fact that Ybarra involved a public

place and the instant case a private residence. Petitioner submits that a "relationship of the person to the premises" test is unsatisfactory as a necessary condition for searches of persons on private premises. The search of persons on private premises under a warrant for the premises should be permitted where the items sought could be concealed on the person because it is reasonable to believe the items might be found on such persons, and thus the search is within the scope of the warrant.

In a concurring opinion in United States v Micheli, supra, Judge Campbell rejected the "relationship of the person to the place" standard, arguing that it "grants possible sanctuary to all manner of arguably intimate personal effects carried upon the premises and then set down":

> A search of such objects is neither more nor less intrusive than would be the search of similar objects whose owner, having deposited them, had left the premises before the police arrived. Any search is an invasion of privacy; but I think the cause for issuance of the original warrant allows a search of relevant personal effects not in the possession of their owner as well as of all other relevant objects on the premises. The contraband or incriminating evidence covered by the warrant is as likely to be within brief cases or bags just brought on the premises as within other objects in the premises (footnote omitted). It is true that if the officer knows the owner of the brief case has no 'relationship' to the premises, he might have less reason to search. But in many cases the police would have no way of knowing, in advance, what is the individual's actual connection with the premises. When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require the police to believe him — or inquire further before searching his bag. 487 F 2d at 433.

Argument

In State v Kurtz, 612 P 2d 749 (Or App, 1980) the court approved the search of a daypack under a search warrant for premises for narcotics, declining to adopt defendant's proposed test that guests with identifiable personal property should be allowed to identify and claim their property before the search. The court found persuasive the concerns voiced by the trial court:

> It just seems to me that it would not be practicable to have a rule that everything that belongs to somebody else in a house is therefore not subject to search when the Magistrate (has) authorized (a) search (of) the house. As a practical matter I don't see how we can impose an additional burden on law enforcement officers to have to take some further steps to identify what in the house belonged to the owner or what in the house belonged to the occupants as opposed to what in the house may belong to the visitors, so I am going to deny the motion to suppress.

Similarly, petitioner submits that in cases of searches of persons on the premises officers would rarely know the individual's actual connection with the premises, nor should officers be required to believe assertions of "non-relationship." Though the instant case could be justified on a relation of the person to the premises test, since defendant told the officers executing the warrant that he was the owner (see Judge Bazelon's opinion in Johnson, supra), petitioner agrees with Judge Campbell that the test is unsatisfactory. A search of reasonable scope and intensity of persons on private premises pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets. Both the majority and the concurrence did remark in passing that personal searches were not permitted pursuant to a search warrant for premises, Judge Campbell stating

that such as an "exception" to what he perceived to be the rule that a search warrant ". . . justifies whatever intrusion may result from searching all articles found on the premises having characteristics making it possible for them to harbor the matter described in the warrant." 487 F 2d at 433. As will be set forth more fully subsequently, petitioner submits that the supposed "exception" is ill-founded and unjustifiable where applied to private premises.

Several state courts have also had occasion to grapple with the issue. In People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966), defendant was convicted of unlawful possession of narcotics as a result of a search of his person when he entered an apartment where police officers were engaged in the execution of a search warrant. The officers had fruitlessly been searching the premises for some fifteen minutes. The court held that "the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. . . .The United States Constitution prohibits unreasonable searches. . .the search of Raymond Pugh under the circumstances of this case cannot be so classified." See People v Kielczynski, 264 NE 2d 767 (Ill App, 1970), where in upholding the search of a person pursuant to a warrant for premises for gambling instruments, implements, and apparatus, the search revealing records of horse race bets, the court said: "We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant." 264 NE 2d at 771. See also People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972).

A barber shop was the premises described in Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973), and the articles named were narcotics and narcotics

paraphernalia. Defendant was not the owner of the premises, but was present when the warrant was executed. His coat was hanging on a hook, was searched, and Heroin found. The court stated that the search was not a search of the person, but went on to say that the warrant authorized the police

> to search anywhere within the four walls of the barber shop where the contraband described in their warrant might be located. They could search the various rooms, closets or storage places, including possible concealed storage places. They could look on, under, behind, or inside any piece of furniture, container or other object in the described premises, lift or remove any object to facilitate their search, and search the pockets, liners or any other parts of articles of clothing where the objects of their search might be secreted. 298 NE 2d at 812.

See also Commonwealth v Smith, 348 NE 2d 101 (1976).

State v Loudermick, 494 P 2d 1174 (Kansas, 1972) involved the search of a person on the premises. Again, narcotics were the object of the search.

> Narcotics, such as Heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotics Drug Act. 494 P 2d at 1178.

See also State v McClelland, 523 P 2d 357 (Kansas, 1974); Martinez v State, 504 SW 2d 897 (Ct App Tex, 1974); Guerra v State, 496 SW 2d 92 (Ct App Tex, 1974);

and United States v Kralik, 611 F 2d 343, 345 (CA 10, 1979) (allowing the search of a suitcase found in an auto where the officers had a warrant to search the auto because the Fourth Amendment does not require a search warrant for each container within a larger container where the warrant covers the search of the larger container — "Theory should not be entirely divorced from practicality.")

Several cases state the proposition that a search warrant for premises does not include a right to search persons on the premises. See e.g., People v Lujan, 484 P 2d 1238 (Colo, 1971); City of Tacoma v Mondell, 495 P 2d 682 (Wash App, 1972). Most of these cases give little or no discussion to the rationale of such a rule, simply citing United States v Di Re, 332 US 581 (1947) for the proposition. But on close analysis, Di Re does not support the rule.

Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed place. Officers approached the auto — Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The court held that simply because there was probable cause to believe that Battita possessed coupons this gave no probable cause to search Di Re, nor to arrest him. This opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search of persons on the premises (the precise question at issue here), and the court reasoned that an unwarranted search of an auto would not justify a search of all occupants. But clearly the facts demonstrate that the officers only had reason to believe Reed and Battita possessed coupons.

Argument

To cite Di Re for the proposition that a private premises directed warrant will not allow a search of the person is thus misleading.

Although recognizing that it was unable to persuade a majority of the Court in Ybarra, petitioner submits that the logic of Justice Rehnquist's dissent is compelling in considering a search of persons on private premises. A search warrant is an anticipatory authorization to search. Just as officers cannot necessarily foresee the existence of closets, cupboards, desks, nightstands, and briefcases, neither can they necessarily foresee the existence of persons with either an interest in the items to be seized or an interest in frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought after items is permitted. A search of reasonable intensity includes the pockets of persons on private premises where the items named in the warrant could be concealed on the person.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of knock and announce requirements is considered. Before officers executing a search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCL 780.656. Case law holds that after announcing their authority and purpose the officers must wait long enough for the inhabitants of the premises to reach the door from the room farthest away before forcing entry. See e.g. People v Harvey, 38 Mich 39; 195 NW 2d 773 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in

his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, for example a package of Heroin, in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises might put the Heroin in his pocket and walk out the door on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on private premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets of the persons to be places within the premises and thus covered by the warrant, is a reasonable search, and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Argument

III.

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, IT CANNOT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED.

Should this Court hold that the search of respondent cannot be justified as pursuant to the warrant, and that his search is also unsupportable as incident to arrest in that his initial detention was unconstitutional, then "consideration of official motives" comes into play in determining whether application of the exclusionary rule is appropriate. Scott v United States, supra. Petitioner submits that the officers conduct here, viewed objectively, was taken in a reasonable, good faith belief that it was proper. Application of the exclusionary rule is thus at once inappropriate, futile, and counter-productive.

Very recently the Fifth Circuit sitting en banc adopted a "good faith" exception to the exclusionary rule. United States v Williams, F 2d (CA 5, 1980). Reasoning from a number of this Court's decisions the Circuit embraced the good faith exception in the following terms:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct

leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

. . . As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad faith police conduct.

This holding follows logically from a number of this Court's decisions.[7]

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. United States v Calandra, 414 US 338, 348 (1974). Whether or not a suppression remedy should be applied after a constitutional violation has been demonstrated, Scott v United States, supra, depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See United States v Janis, 428 US 433, 446 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct,'" and Stone v Powell, 428 US 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." The test is well-stated in United States v Peltier, 422 US 531, 542 (1975):

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional

> under the Fourth Amendment. . . .we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car.

Keeping in mind the observation in Calandra, 414 US at 348 that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in Michigan v Tucker, 417 US 433, 446 (1974), that "where the official action was pursued in complete good faith. . .the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." Brown v Illinois, 422 US 590 (1975). As stated by Justice White, dissenting in Stone v Powell, supra, "surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably. . . ."

The exclusionary rule has also been justified by relying on the "imperative of judicial integrity." In Weeks v United States, 232 US 383 (1913) this Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal trials. But it must be noted that Weeks did not involve a factual setting where it could be argued that the officer acted in good faith. The United States Marshall simply searched Weeks' home without a search warrant or arrest warrant. He acted "without sanction of law." 232 US at 393. Similarly, in Elkins v United States, 364 US 206 (1960), in rejecting the "silver platter" doctrine, this Court stated that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (emphasis

added). 364 US at 223. But as recognized in Peltier and Stone v Powell, supra:

> . . . judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn 2.

When a court admits evidence seized in good faith it is simply not acting as accomplice to a "willful" violation of the Constitution (if indeed there is any violation of the Constitution at all, see I and II, supra). See also Fuller v Alaska, 393 US 80 (1968); Linkletter v Walker, 381 US 618 (1965).

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. Burdeau v McDowell, 256 US 465 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. Brown v United States, 411 US 223 (1973). Note should also be taken of the fact that illegally seized evidence may be used for impeachment purposes. Walder v United States, 347 US 62 (1954); Harris v New York, 401 US 222 (1971). In short, the imperative of judicial integrity is a corollary to the principle of deterrence. The integrity of the court is not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution. Elkins, supra.

In conclusion, petitioner would point out that this

Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose. Michigan v Tucker, 417 US at 446.

> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concedly relevant and trustworthy evidence. Michigan v Tucker, 417 US at 450.

Professor Amsterdam has stated the need to limit the exclusionary rule to situations where its deterrent function is served thusly:

> As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest. . . ." Amsterdam, Search, Seizure and Section 2255: A Comment, 420 Pa L Rev 378, 388-389 (1964).

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity.

[1] Even where a warrant is required the concern is the privacy of the dwelling and not the warrantless seizure of the person. Payton v New York, supra.

[2] See Ariz Rev Stat Ann s. 13-1424; Colo R Crim P 41.1; Idaho Code s. 19-625; NC Gen Stats, s. 15A-271; Utah Code Ann, s. 77-13-77.

[3] State v Gryalva, 533 P 2d 533 (Ariz, 1975); Long v Garratt, 527 P 2d 1240 (Ariz, 1974); Wise v Murphy, 275 A 2d 205 (DC App, 1971); In re Fingerprinting of M.C., 309 A 2d 3 (1973).

[4] Dunaway should also not be read to disallow the practice of returning persons validly stopped under Terry to the scene of a crime for a prompt identification, a practice which has been iwdely approved. LaFave, supra, at p. 37.

[5] See e.g. United States v Peep, 490 F 2d 903 (CA 8, 1974); State v Muckleroy, 552 P 2d 257 (Or., 1976); Guzman v Estelle, 493 F 2d 532 (CA 5, 1974).

[6] People v Davenport, 39 Mich App 252; 197 NW 2d 521 (1972).

[7] See also Chief Justice Burger's dissent in Bivens v Six Unknown Federal Agents, 403 US 388 (1971), criticizing the exclusionary rule because of its undifferentiating treatment of gross and technical violations of the Fourth Amendment, and Justice Rehnquist's dissent in California v Minjares, ___ US ___, 61 L Ed 2d 892 (1979).

CONCLUSION

Wherefore, Petitioner concludes that this Court should reverse the Michigan Supreme Court, hold that the Heroin seized from respondent may be admitted at trial consistent with the Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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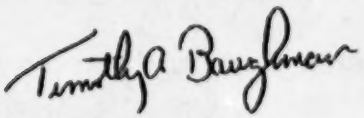

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